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NO. 82-403

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1982

COUGAR BUSINESS OWNERS ASSOCIATION, et al.,

Petitioners,

v.

STATE OF WASHINGTON; DIXIE LEE RAY, Governor; JOHN DOE ONE and JOHN DOE TWO,

Respondents.

On Certiorari from the Supreme Court

of the State of Washington

PETITITON FOR CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Has a state governor exceeded her authority and wrongfully confiscated private property by declaring a state of emergency and restricting property use, prior to any property destruction, and by failing to terminate such restrictions after order is restored, even though such destruction and termination of emergency are required by statute.

2. Has a person been deprived of property without due process when a governor's emergency declaration, that restricts use of private property, is held by the state supreme court to be totally discretionary and immune from review in a tort action, and which declaration is held unimpeachable by the emergency statute.

IDENTIFICATION OF PETITIONERS

COUGAR BUSINESS OWNERS ASSOCIATION, consisting of DONALD P. and MARILYN J. PLATT, husband and wife, and EARL and G. BARCUS, husband and wife, d/b/a LONE FIR RESORT; RONALD and ANNETTE L. KATZER, husband and wife, d/b/a A & R GROCERY; EUGENE H. and DAWN MORTINSEN, husband and wife, d/b/a THE WILDWOOD INN AND CAFE; JOHN E. and D. KELLEY, husband and wife, d/b/a KELLEY'S REPAIR & WELDING; DAVID R. and LAURAL FISHER, husband and wife, d/b/a ARIEL STORE & TAVERN; ELVIN H. and DOROTHA L. ELMIRE, husband and wife, and LOIS LIVINGSTON, d/b/a THE COUGAR STORE; RPM CONSTRUCTION, INC., d/b/a COUGAR UNION SERVICE STATION; and JAMES V. and NEOMI GIPE, husband and wife.

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PETITITON FOR CERTIORARI

OFFICIAL OPINION

The reported opinion by the Washington State Supreme Court in the instant case can be found at 97 Wash. 2d 466, ____ P.2d ____ (1982). (See Appendix A.)

GROUNDS OF JURISDICTION

The judgment which is sought to be reviewed is that of the Washington State Supreme Court which was filed on June 10, 1982. The jurisdiction of this Court to review the decision of the Washington State Supreme Court is conferred by 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES INVOLVED

1. U.S. Const. amend. V.

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

2. U.S. Const. amend. XIV, § 1.

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

3. Wash. Const. art. 1, § 3.

Personal Rights. No person shall be deprived of life, liberty, or property, without due process of law.

4. Wash. Const. art. 1, § 16.

Eminent Domain. Private property shall not be taken for private use, except for private ways of necessity, and for drains, flumes or ditches on or across the lands of others for agricultural, domestic or sanitary purposes. No private property shall be taken or damaged for public or private use without just compensation having been first made, or paid into court for the owner, and no right-of-way shall be appropriated to the use of any

corporation other than municipal, until full compensation therefor be first made in money, or ascertained and paid into the court for the owner, irrespective of any benefit from any improvement proposed by such corporation, which compensation shall be ascertained by a jury, unless a jury be waived as in other civil cases in courts of record, in the manner prescribed by law. Whenever an attempt is made to take private property for a use alleged to be public, the question whether the contemplated use be really public shall be a judicial question, and determined as such without regard to any legislative assertion that the use is public.

5. Wash. Rev. Code § 43.06.010(12)

General powers and duties.

In addition to those prescribed by the Constitution, the governor may exercise the powers and perform the duties prescribed in this and the following sections:

. . . .

(12) The governor may, after finding that a public disorder, disaster, energy emergency, or riot exists within this state or any part thereof which affects life, health, property, or the public peace, proclaim a state of emergency in

the area affected, and the powers granted the governor during a state of emergency shall be effective only within the area described in the proclamation;

6. Wash. Rev. Code § 43.06.200 **Definitions.**

Unless a different meaning is plainly required by the context, the following words and phrases as hereinafter used in RCW 43.06.010, and 43.06.200 through 43.06.270 each as now or hereafter amended shall have the following meaning:

"State of emergency" means an emergency proclaimed as such by the governor pursuant to RCW 43.06.010 as now or hereafter amended.

7. Wash. Rev. Code § 43.06.210 **Proclamation of state of emergency-- Termination.**

The proclamation of a state of emergency and other proclamations or orders issued by the governor pursuant to RCW 43.06.010, and 43.06.200 through 43.06.270 as now or hereafter amended shall be in writing and shall be signed by the governor and shall then be filed with the secretary of state. The governor shall give as much public notice as practical through the

news media of the issuance of proclamations or orders pursuant to RCW 43.06.010, and 43.06.200 through 43.06.270 as now or hereafter amended. The state of emergency shall cease to exist upon the issuance of a proclamation of the governor declaring its termination: Provided, That the governor must terminate said state of emergency proclamation when order has been restored in the area affected.

8. Wash. Rev. Code § 38.52.010(7)

Definitions.

As used in this chapter:

. . . .

(7) "Disaster" as used in this chapter shall mean events, arising out of either enemy attack, sabotage, or other hostile action, or natural causes, which reach such a dimension or degree of destructiveness as to warrant the governor declaring a state of emergency pursuant to RCW 43.06.010.

9. Wash. Rev. Code § 38.08.060

Governor's decision final.

Whenever any portion of the militia is ordered to duty by the governor, the decision of the governor shall be final,

incontrovertible, and unimpeachable.

10. Wash. Rev. Code § 38.08.040

Governor may order out organized militia.

In event of war, insurrection, rebellion, invasion, tumult, riot, mob or body of men acting together by force with intent to commit a felony or to offer violence to persons or property, or by force and violence to break and resist the laws of this state, or the United States, or in case of the imminent danger of the occurrence of any of said events, or whenever responsible civil authorities shall, for any reason, fail to preserve law and order, or protect life or property, or the governor believes that such failure is imminent, or in event of public disaster, the governor shall have power to order the organized militia of Washington, or any part thereof, into active service of the state to execute the laws, and to perform such duty as he shall deem proper.

11. Wash. Rev. Code § 4.92.090

Tortious conduct of state--Liability for damages.

The state of Washington, whether acting in its governmental or proprietary

> capacity, shall be liable for damages arising out of its tortious conduct to the same extent as if it were a private person or corporation.

STATEMENT OF THE CASE

On March 3, 1980, the governor of the state of Washington declared a state of emergency pursuant to Wash. Rev. Code § 43.06.210 and Wash. Rev. Code § 38.08.040, due to the reactivation of the volcano, Mt. St. Helens. This declaration was made prior to any destruction of property from volcano activity. On April 30, 1980, again prior to any damage from the volcano's reactivation, the governor, by Executive Order No. 80-05, created two restricted zones around the mountain. Petitioners' home town was placed in the "red" zone. Access to the areas was restricted to official government, law enforcement, scientific, and search and rescue activity. On May 18, 1980, Mt. St.

Helens erupted, causing property damage and loss of life. On May 25, 1980, the governor, by executive order, extended the red zone and restricted access to the areas to those mentioned above, plus the news media, individual property owners, persons with businesses within the zone, and others by special permit. Eruptions continued throughout the summer causing no further loss of life, nor significant property damage. On October 1, 1980, the town of Cougar was removed from the red zone by a governor's executive order, but the emergency order was not terminated.

The Petitioners brought suit against the State of Washington, Governor Ray, and two unnamed individuals based upon Governor Ray's declaration of emergency on April 3, 1980. The Petitioners sought damages based on the governor declaring the emergency too soon, for her including Cougar in the restricted zone, and for

her failing to remove the restricted zone soon enough. Petitioners alleged that the governor's power to declare an emergency was limited to specifically definable events. However, the Cowlitz County Superior Court granted a summary judgment in favor of the Respondent, and the Washington State Supreme Court affirmed, reasoning that a governor's declaration of emergency is totally discretionary and therefore precludes any state liability under Wash. Rev. Code § 4.92.090. [Appendix A at A-14--A-15.]

ARGUMENT AND REASONS FOR GRANTING THE WRIT

This case presents important federal and state constitutional issues which must be decided since 48 other states have emergency legislation similar to Washington. [See Appendix B.]

Petitioners assert that the Washington State governor lacked the

power to declare an emergency prior to May 18, 1980, under either Wash. Rev. Code § 43.06 or Wash. Rev. Code § 38.52, and that the Washington Supreme Court erred in holding that the determination of the existence of an emergency is a wholly discretionary decision by the governor. The argument is based on:

1. That the state's exercise of its emergency police power must be reasonable and meet constitutional safeguards.

2. That the emergency statute defining "disaster" limits a governor's discretionary power to declare a state of emergency only when such an event occurs.

3. That a governor's uninhibited exercise of emergency police power exceeds the constitutional safeguards.

4. A governor's decision exceeding her authority creates liability on the part of the state.

A. State Police Power

It is a general rule that a state may use its police power to reasonably regulate property use to protect public safety and welfare. Nebbia v. New York, 291 U.S. 502 (1934). However, a state cannot use its police power to arbitrarily invade property rights, Washington ex rel. Seattle Title Trust Co. v. Roberge, 278 U.S. 116 (1928), and must exercise its power within state and federal constitutional limitations applicable to all governmental action. Day-Bright Lighting, Inc. v. Missouri, 342 U.S. 421 (1952), reh'g denied, 343 U.S. 921 (1952).

None of the 49 states with emergency legislation specifically define "emergency" within their statute. [See Appendix B.] Generally, the decision regarding the existence of an emergency situation is left to the discretion of

the governor and/or state legislature, with such decision being reviewable by the Court. Home Bldg. & Loan Assn. v. Blaisdell, 290 U.S. 398 (1933); State ex rel. Satterthwaite v. Hinkle, 152 Wash. 221, 227 P. 837 (1929). All principles regarding a state legislature's exercise of its police power apply to decisions of state governors. Inman v. Sandwig, 170 Wash. 112, 15 P.2d 696 (1932).

B. State Statute Defining Disaster Limits Governor's Ability to Declare Emergency

None of the 49 different emergency statutes define "emergency." [See Appendix B.] Washington's general power statute merely defines "state of emergency" as an "emergency proclaimed as such by the governor pursuant to RCW 43.06.010 as now or hereafter amended." Wash. Rev. Code § 43.06.200. However, Washington is unique in that its specific Emergency Service Statute, Wash. Rev.

Code § 38.52, which Governor Ray invoked to restrict the use of Petitioners' property, defines disaster to mean "events arising out of either enemy attack, sabotage, or other hostile action, or natural causes, which reach such a dimension or degree of destructiveness as to warrant the governor declaring a state of emergency pursuant to RCW 43.06.010." Wash. Rev. Code § 38.52.010(7). Therefore, by statute itself, the governor was unable to declare an emergency absent some property destruction or loss of human life. Her declaration of emergency prior to any such events in anticipation of an assumed future disaster exceeded her authority granted by the state legislature. The Washington Supreme Court, however, ignores the definitional section under Wash. Rev. Code § 38.52 and justifies its decision on the statute's

broad-stated policy and sympathetic approval of the governor's action. [See Appendix A at A-13, A-14.] The governor's action, however, was an improper exercise of police power and violated Petitioners' due process rights protected by federal and state constitutions. Nashville, C. & St. L. Railway v. Walters, 294 U.S. 405 (1935); Grenada Lumber Co. v. Mississippi, 217 U.S. 433 (1910); [See, U.S. Const. amend. V; U. S. Const. amend. XIV; Wash. Const. art 1, § 3; Wash. Const. art. 1, § 16], and such exercise resulted in an arbitrary and unreasonable interference with personal rights under the guise of police power; Meyer v. Nebraska, 262 U.S. 390 (1923).

C. A Governor's Uninhibited Exercise of Police Power Exceeds Constitutional Safeguards

The Washington Supreme Court

interprets the state's emergency power statute as giving the governor unbridled power to declare an emergency based on a presumed future disaster and regardless of whether an actual disaster exists. [See Appendix A at pages A-10--A-14.] They justify their decision under the state's broad police power. [See Appendix A at A-14] However, police powers cannot be invoked as universal remedies nor arbitrarily interfere with rights guaranteed by the constitution. Goldman v. Crowther, 147 Md. 282, 128 A. 50, 38 A.L.R. 1455 (1925); Otis v. Parker, 187 U.S. 607 (1902); State ex rel. Webster v. Superior Court of King County, 67 Wash. 37, 120 P. 861 (1912); Karasek v. Peier, 22 Wash. 419, 61 P. 33 (1900).

The Washington court failed to address the issue of whether a disaster existed when the emergency power was

invoked [See Appendix A at A-13--A-14], even though the emergency power used depends on existence of a disaster to bring it into operation. Wash. Rev. Code § 43.06.010(12) states:

> The governor may, after finding that a public disorder, disaster, energy emergency, or riot exists within the state or any part thereof which affects life, health, property, or the public peace, proclaim a state of emergency in the area affected, and the powers granted the governor during a state of emergency shall be effective only within the area described in the proclamation.

Additionally, the court ignored the definitional section under Wash. Rev. Code § 38.52, which defines a disaster to include "natural causes which reach such a dimension or degree of destructiveness as to warrant the governor's declaring a state of emergency pursuant to RCW 43.06.210." Wash. Rev. Code § 38.52.010(7). [See Appendix A at A-13--A-14.] This section clearly requires

some property destruction before an emergency exists to justify the governor invoking emergency legislation. The court's affirmation of the governor's action expanded the governor's power beyond that granted by the state legislature and, in effect, allows the state's governor, under color of emergency police power, to arbitrarily restrict a person's use and enjoyment of his property, without ability to be compensated for an abuse of discretion, and therefore in violation of a person's constitutional rights. See, Dobbins v. Los Angeles, 195 U.S. 223 (1904); Lawton v. Steele, 152 U.S. 133 (1894); Re Aubrey, 36 Wash. 308, 78 P. 90 (1904); [See, U.S. Const. amend. V; U.S. Const. amend. XIV; Wash. Const. art. 1, §3; Wash. Const. art. 1, §16]. This is true since the governor's decision, according to the Washington Supreme Court and Wash.

Rev. Code § 38.52, is immune from an action in tort. [See Appendix A at A-14--A-15.]

The court effectively denies citizens the right to have the governor's action reviewed at all. The court exempts the governor's action from review in a tort action, but states that a mandamus proceeding could be maintained by property owners as a means to challenge the governor's actions. However, such a proceeding, like a tort action, under the court's reasoning, would run into the bar of Wash. Rev. Code § 38.08.060, which states: "Whenever any portion of the militia is ordered to duty by the governor, the decision of the governor shall be final, incontrovertible, and unimpeachable." [See Appendix A at A-12.] Such a rule not only violates a person's due process rights protected by both federal and state

constitutions [See, U.S. Const. amend. XIV; Wash. Const. art. 1, §3], but also conflicts with the many cases holding that the final determination of the existence of an emergency is left to the courts. Home Building & Loan Assn. v. Blaisdell, 290 U.S. 398 (1933).

Additionally, the Washington Supreme Court summarily dismisses the issue that the governor was required to terminate the state of emergency when order in the area was restored. [See Appendix A at A-14.] Again, such a decision, like a decision to declare an emergency, is not totally discretionary under Washington's statute, see Wash. Rev. Code § 43.06.210, but is tied to objective factors regarding the continued destruction from a previous disaster. The governor's failure to terminate the emergency and remove Petitioners' property from the restricted zones, shortly after damage

from the May 18th eruption subsided, by early June, constitutes an abuse of power by the governor. The retention of Petitioners' property in the restricted zones until October, well after the "emergency" ended, constituted an unreasonable deprivation of Petitioners' property. Such wrongful deprivation without just compensation or possible judicial review due to the tort immunity, plus statutory prohibition against suits to challenge the governor's decisions, violated Petitioners' due process rights guaranteed by both federal and state constitutions.

D. Governor's Liability for Exceeding her Authority

The Washington Supreme Court absolved the governor from any liability under Wash. Rev. Code § 4.92.090, stating that discretionary governmental decisions are immune from tort liability, and

additionally cited Wash. Rev. Code § 38.08.060, which provides in part that a governor's decision under that statute is unimpeachable. [See Appendix A at A-12.]

However, as noted above, declaration of a state of emergency and its termination are not wholly discretionary, but involve specifically definable events.

Also, as shown above, the governor's actions exceeded her authority and therefore should make her liable for damages suffered by Petitioners' loss of the use of their property.

In summary:

1. Exercise of emergency police powers by a state governor must be reasonable.

2. The governor's unlimited ability to declare an emergency without specific guidelines as to what is an

emergency, and without judicial review, allowed the governor to arbitrarily restrict the use of Petitioners' property in violation of state and federal protected constitutional rights.

3. Additionally, the governor exceeded her authority under Wash. Rev. Code § 38.52 by declaring the state of emergency before any disaster occurred.

4. Such abuse of power is amendable to a tort action under Wash. Rev. Code § 4.92.090.

Respectfully submitted,

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